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Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-33–05 OF 2018(W)
ZAWAWI SALLEH, VERNON ONG, ABDUL RAHMAN SEBLI, ZALEHA YUSOF FCJJ AND BADARIAH SAHAMID JCA
27 AUGUST 2020

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Arbitration — Award — Application to set aside — Party applying to set aside arbitral award ('applicant') contended that arbitrator made award based on extraneous evidence not brought to attention of parties during the proceedings — Whether award breached rules of natural justice in denying parties opportunity to respond to the extraneous evidence — Whether High Court was wrong to refuse to set aside award because applicant had not shown that arbitrator's breach had caused it to suffer prejudice — Whether Arbitration Act 2005 did not require applicant to show as a pre-requisite that it had suffered prejudice — Whether merely showing that rules of natural justice had been breached was insufficient to cause award to be set aside if breach was trivial or immaterial — Whether in order to move court to set aside award it had to be shown that the breach had materially affected the decision of the arbitration such that if not for the breach the result of the arbitration would have been different

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Pursuant to a charter party agreement ('CPA'), the appellant hired out a sea-vessel to the respondent to carry out undersea pipeline installation works. The vessel was fitted with a mechanism called a stinger hitch which was essential for the works to be carried out. Under the CPA, the respondent had to return the vessel by a certain date failing which it had to pay a certain daily sum until redelivery was made. The vessel was returned to the appellant 37 days late. Apparently, the delay was caused by damage to the stinger hitch while it was being used. The respondent's attempt to repair the damage in fact caused a structural alteration to the vessel because the detachable stinger hitch was welded to the hull of the vessel. The appellant claimed a substantial amount from the respondent for, inter alia, hire charges for the period during which the vessel was not returned and for costs incurred to undo the repair done to the stinger hitch and to restore the vessel to its original condition while it was in dry dock. The dispute between the parties over the appellant's claim was arbitrated, ending in an award in favour of the appellant. The respondent applied to the High Court to set aside the award under ss 37 and 42 of the Arbitration Act 2005 ('the AA') on the ground that: (a) in making his award, the arbitrator had breached the rules of natural justice thus rendering the award contrary to the public policy of Malaysia under s 37(1)(b)(ii) read with s 37(2)(b) of the AA; and (b) the award went beyond the terms of submission to arbitration under

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s 37(1)(a)(iv) of the AA. The High Court decided that: (i) the arbitrator had decided all matters which were submitted to him for arbitration and had not decided any matter that went beyond his terms of reference; (ii) the arbitrator had not only breached his duty under s 20 of the AA (to accord equal treatment to the parties and give them a fair and reasonable opportunity of presenting their case) but had also breached the rule of natural justice when he failed to inform the parties of certain extraneous evidence that he was going to rely upon and failed to give them the opportunity to address and respond to the reliance on that evidence; (iii) even if the arbitrator had committed the said breaches, the court had a discretion under s 37(1) of the AA not to set aside the award; (iv) the award would only be set aside if the applicant could show that the breaches had caused it prejudice or injustice. On the respondent's appeal, the Court of Appeal ('COA') reversed the High Court's decision and set aside the whole arbitral award. The COA held that, inter alia: (1) where an award conflicted with the public policy of Malaysia for being in breach of the rules of natural justice, the whole award had to be set aside and not just a suggested part of it; (2) the extraneous evidence relied upon by the arbitrator enabled him to decide what caused the damage to the stinger hitch and consequently make the award that he did; conversely, if not for that extraneous evidence, the arbitration might have reached a different conclusion; and (3) despite the importance of the extraneous evidence, the arbitrator had not given the parties the opportunity to address and respond to it. The appellant was granted leave to appeal to the Federal Court against the COA's decision.

Held, unanimously dismissing the appeal and affirming the COA's decision:

(1) The opening words of s 37(1) of the Arbitration Act 2005, which employed the words 'may be set aside' was plain and unambiguous. It clearly provided that the High Court retained a residual discretion not to set aside an award even though a ground for setting aside had been made out (see para 46).

(2) In the present appeal, the High Court, despite making a clear finding that the arbitrator had committed two breaches of the rules of natural justice, declined to set aside the award on the ground the respondent was not prejudiced by the breaches. In doing so, the High Court had adopted the position in Singapore where the arbitration law required the applicant to show that the rights of any party had been prejudiced. The Singapore position was not applicable in Malaysia because ss 37(1)(b)(ii) and 37(2)(b)(ii) of the AA did not require prejudice to be shown. The courts should be mindful against importing and applying principles advocated by foreign jurisdictions without carefully considering the foreign law vis a vis the arbitration law in this country (see paras 55–56).

(3) A mere finding that the rules of natural justice had been breached was in itself insufficient. It had to be shown that the breach was significant or

serious such as to have had an impact on the outcome of the arbitration. Prejudice, though a relevant consideration, was not a requirement (see para 62).

(4) The Court of Appeal was correct in setting aside the entire award on the basis that the breach of natural justice had materiality and causative effect on the outcome of the arbitration. In addition to finding that the terms of s 37 of the AA did not appear to allow for the operation of the principle of severance, especially in view of the terms of s 37(3) read with s 37(1)(a)(v), the COA found that the two pieces of extraneous evidence were relevant and material to the issue of causation of the damage to the stinger hitch and that the evidence in question was considered by the arbitrator without informing the parties until the award was rendered, by which time it was too late. As such, the case which had been submitted for arbitration was redefined by the arbitrator without giving the parties the opportunity to present their responses. This court agreed with the COA that without these two pieces of extraneous evidence, which were never put to the parties, the arbitration would have reached a different outcome (see paras 55 & 60).

(5) The following were guiding principles on the exercise of the court's residual discretion when confronted with an application to set aside an award grounded on breach of natural justice: (a) first, the court had to consider: (i) which rule of natural justice was breached; (ii) how it was breached; and (iii) in what way the breach was connected to the making of the award; (b) second, the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding; (c) third, if the breach was relatively immaterial or was not likely to have affected the outcome of the arbitration, the application to set aside would be refused; (d) fourth, even if the court found that there was a serious breach, if the breach would not have had any real impact on the result and the arbitral tribunal would not have reached a different conclusion, the court might refuse to set aside the award; (e) fifth, where the breach was significant and might have affected the outcome, the award might be set aside; (g) sixth, in some instances, the significance of the breach might be so great that the setting aside of the award was practically automatic, regardless of the effect on the outcome of the award; (h) seventh, the discretion given the court was intended to confer a wide discretion dependent on the nature of the breach and its impact. Therefore, the materiality of the breach and the possible effect on the outcome were relevant factors for consideration by the court; and (i) eighth, whilst materiality and causative factors were necessary to be established, prejudice was not a pre-requisite or requirement to set aside an award for breach of the rules of natural justice (see para 53).

[Bahasa Malaysia summary

Berdasarkan perjanjian penyewaan kapal ('CPA'), perayu menyewa kapal laut kepada responden untuk melakukan kerja pemasangan saluran bawah laut. Kapal tersebut dilengkapi dengan mekanisme yang disebut *stinger hitch* yang amat diperlukan untuk kerja-kerja yang akan dilakukan. Di bawah CPA, responden harus mengembalikan kapal pada tarikh tertentu sekiranya gagal ia harus membayar jumlah harian tertentu sehingga penghantaran semula dibuat. Kapal tersbut dikembalikan kepada perayu lewat selama 37 hari. Kelewatan tersebut adalah disebabkan oleh kerosakan pada *stinger hitch* semasa ia digunakan. Cubaan responden untuk memperbaiki kerosakan sebenarnya telah menyebabkan perubahan struktur pada kapal kerana *stinger hitch* yang boleh lepas telah dikimpal pada lambung kapal. Perayu menuntut sejumlah besar dari responden untuk, antara lain, caj sewaan untuk tempoh di mana kapal tidak dikembalikan dan untuk perbelanjaan yang dikeluarkan untuk membuat pembaikan yang dilakukan ke atas *stinger hitch* dan untuk mengembalikan semula keadaan kapal semasa berada di limbungan. Pertikaian antara pihak-pihak mengenai tuntutan perayu telah ditimbang tara, berakhir dengan keputusan yang memihak kepada perayu. Responden memohon kepada Mahkamah Tinggi untuk mengetepikan keputusan di bawah ss 37 dan 42 dari Akta Timbang Tara 2005 ('Akta') dengan alasan bahawa: (a) semasa membuat keputusannya, penimbang tara telah melanggar peraturan keadilan semula jadi dengan menjadikan award tersebut bertentangan dengan kepentingan awam Malaysia di bawah s 37(1)(b)(ii) dibaca bersama s 37(2)(b) Akta, dan (b) award tersebut melampaui syarat yang dibenarkan timbang tara di bawah s 37(1)(a)(iv) Akta. Mahkamah Tinggi memutuskan bahawa: (i) penimbang tara telah memutuskan kesemua perkara yang diserahkan kepadanya untuk timbang tara dan tidak memutuskan perkara yang melampaui bidang tugasnya; (ii) penimbang tara bukan sahaja telah melanggar tugasnya di bawah s 20 dari Akta (untuk memberikan perlakuan yang sama rata kepada pihak-pihak dan memberikan mereka peluang yang adil dan saksama untuk membentangkan kes mereka) tetapi juga telah melanggar peraturan keadilan semula jadi apabila beliau telah gagal memaklumkan pihak-pihak mengenai bukti-bukti luar biasa yang akan diguna pakai dan gagal memberi mereka peluang untuk menangani dan bertindak terhadap penggunaan bukti tersebut; (iii) sekiranya penimbang tara telah melakukan pelanggaran tersebut, mahkamah mempunyai budi bicara di bawah s 37(1) Akta untuk tidak mengetepikan award; dan (iv) award hanya akan diketepikan sekiranya pemohon dapat menunjukkan bahawa pelanggaran tersebut telah menyebabkan prejudis atau ketidakadilan. Semasa rayuan responden, Mahkamah Rayuan ('MR') membatalkan keputusan Mahkamah Tinggi dan mengetepikan keseluruhan keputusan timbang tara. MR memutuskan bahawa, antara lain: (1) apabila award adalah bertentangan dengan kepentingan awam di Malaysia kerana melanggar peraturan keadilan semula jadi, keseluruhan award harus diketepikan dan bukan hanya bahagian yang

dicadangkan; (2) bukti luar biasa yang diguna pakai oleh penimbang tara membolehkannya memutuskan apa yang menyebabkan kerosakan pada *stinger hitch* dan seterusnya membenarkan award seperti yang beliau buat; sebaliknya, jika bukan kerana bukti yang luar biasa tersebut, timbang tara mungkin telah mencapai kesimpulan yang berlainan; (3) walaupun pentingnya bukti yang luar biasa tersebut, penimbang tara tidak memberi peluang kepada pihak-pihak untuk menangani dan bertindak kepadanya. Perayu diberikan kebenaran untuk mengemukakan rayuan ke Mahkamah Persekutuan terhadap keputusan MR.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan keputusan MR:

(1) Kata-kata pembuka s 37(1) Akta Timbang Tara 2005, yang menggunakan kata-kata 'boleh diketepikan' adalah biasa dan jelas. Ianya dengan jelas memperuntukkan bahawa Mahkamah Tinggi memiliki kebijaksanaan untuk tidak mengetepikan award walaupun alasan untuk mengetepikan telah dipenuhi (lihat perenggan 46).

(2) Dalam rayuan semasa, Mahkamah Tinggi, meskipun telah membuat dapatan yang jelas bahawa penimbang tara telah melakukan dua pelanggaran terhadap peraturan keadilan semula jadi, menolak untuk mengetepikan keputusan tersebut dengan alasan responden tidak diprejudiskan oleh pelanggaran tersebut. Dengan berbuat demikian, Mahkamah Tinggi telah mengguna pakai kedudukan di Singapura di mana undang-undang timbang tara memerlukan pemohon untuk menunjukkan bahawa hak mana-mana pihak telah diprejudiskan. Kedudukan di Singapura tidak terpakai di Malaysia kerana ss 37(1)(b)(ii) dan 37(2)(b)(ii) Akta tidak memerlukan prejudis dibuktikan. Mahkamah seharusnya berhati-hati apabila mengambil dan menerapkan prinsip yang diguna pakai oleh bidang kuasa luar tanpa mempertimbangkan undang-undang luar dengan teliti terhadap undang-undang timbang tara di negara ini (lihat perenggan 55–56).

(3) Dapatan bahawa peraturan keadilan semula jadi telah dilanggar dengan sendirinya tidak mengcukupi. Ianya harus ditunjukkan bahawa pelanggaran tersebut ketara atau serius sehingga dapat memberi kesan pada keputusan timbang tara. Prejudis, walaupun pertimbangan yang wajar, bukanlah suatu syarat (lihat perenggan 62).

(4) Mahkamah Rayuan telah dengan tepat dalam mengenepikan keseluruhan keputusan tersebut dengan alasan bahawa pelanggaran keadilan semula jadi telah dengan nyata dan memberi kesan terhadap keputusan timbang tara. Selain dapatan bahawa syarat s 37 Akta seolah-olah tidak membenarkan untuk penggunaan prinsip pemisah, terutamanya memandangkan syarat s 37(3) dibaca bersama dengan s 37(1)(a)(v), MR mendapati bahawa kedua-dua bukti keterangan yang luar biasa itu relevan dan penting bagi isu penyebab kerosakan pada

stinger hitch dan bukti yang dimaksudkan telah dipertimbangkan oleh penimbang tara tanpa dimaklumkan kepada pihak-pihak sehinggalah award diberikan, ianya adalah terlambat pada masa tersebut. Oleh itu, kes yang telah dikemukakan untuk timbang tara telah ditaksirkan semula oleh penimbang tara tanpa memberi peluang kepada pihak-pihak untuk mengemukakan balasan mereka. Mahkamah ini setuju dengan MR bahawa tanpa kedua-dua bukti luar biasa ini, yang tidak pernah dikemukakan kepada pihak-pihak, timbang tara akan membuat keputusan yang berlainan (lihat perenggan 55 & 60).

(5) Berikut ini adalah prinsip-prinsip panduan pelaksanaan budi bicara Mahkamah apabila berhadapan dengan permohonan untuk mengenepikan award berdasarkan pelanggaran peraturan keadilan semula jadi: (a) pertama, mahkamah harus mempertimbangkan: (i) peraturan keadilan semula jadi mana yang dilanggar; (ii) bagaimana ia dilanggar; dan (iii) dengan cara apa pelanggaran itu berhubung kait dengan pemberian award; (b) kedua, mahkamah mesti mempertimbangkan betapa seriusnya pelanggaran tersebut dalam erti sama ada pelanggaran tersebut penting dalam keputusan prosiding timbang tara; (c) ketiga, sekiranya pelanggaran tersebut secara relatifnya tidak penting atau tidak akan mempengaruhi keputusan timbang tara, permohonan untuk mengetepikan akan ditolak; (d) keempat, walaupun Mahkamah mendapati terdapat pelanggaran yang serius, sekiranya pelanggaran tersebut tidak akan memberi kesan nyata terhadap keputusan dan mahkamah timbang tara tidak akan mencapai kesimpulan yang berbeza, mahkamah akan menolak untuk mengetepikan keputusan tersebut; (e) kelima, di mana pelanggaran tersebut ketara dan mungkin mempengaruhi keputusannya, award akan diketepikan; (f) keenam, dalam beberapa keadaan, kesan pelanggaran mungkin begitu besar sehingga award diketepikan secara automatik, tanpa mengira kesan pada keputusan award; (g) ketujuh, budi bicara yang diberikan mahkamah bertujuan untuk memberikan budi bicara yang luas bergantung pada sifat pelanggaran dan kesannya. Oleh itu, ketaranya pelanggaran dan kemungkinan kesan terhadap keputusan adalah faktor yang relevan untuk dipertimbangkan oleh mahkamah; dan (h) kelapan, sementara faktor ketara dan penyebab perlu dibuktikan, prejudis bukanlah prasyarat atau keperluan untuk mengetepikan award terhadap pelanggaran peraturan keadilan semula jadi (lihat perenggan 53).]

Cases referred to

AKM v AKN and Anor [2014] 4 SLR 245, CA (refd)

AKN and another v ALC and others and other appeals [2015] 3 SLR 488, HC (refd)

Ahmani Sdn Bhd v Petronas Panapisan (Melaka) Sdn Bhd [2015] 11 MLJ 32, HC (refd)
Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] 2 MLJ 1; [2020] 1 LNS 57, FC (refd)
Brunswick Bowling & Billiards Corporation v Shanghai Zonglu Industrial Co (2011) 1 HKLRD 7070 (refd)
Fairise Odyssey (M) Sdn Bhd v Tenaga Nasional Bhd [2019] 6 MLJ 281; [2019] 8 CLJ 20, FC (refd)
Far East Holdings Bhd v Majlis Ugama Pahang [2018] 1 MLJ 1, FC (refd)
Government of India v Cairns Energy India Pte Ltd [2014] 9 MLJ 149, HC (refd)
Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1) [2012] HKLRD 1, CA (refd)
Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals [2020] 1 MLJ 311; [2019] 6 MLRA, FC (refd)
Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal [2020] 1 MLJ 174; [2020] 1 CLJ 299, FC (refd)
Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor [2019] 2 MLJ 413; [2019] 1 CLJ 1, FC (refd)
Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd [2015] 6 MLJ 126; [2015] 1 CLJ 617, CA (refd)
Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590; [2017] 1 LNS 296, FC (refd)
Kyburn Investments Ltd v Beca Corporate Holdings Ltd [2015] 3 NZLR 644, CA (refd)
Merck KGaA v Leno Marketing (M) Sdn Bhd (Registrar of Trade Marks, interested party) [2018] 5 MLJ 1; [2018] 6 CLJ 167, FC (refd)
PT Prima International Development v Kempinski Hotels SA and other appeals [2012] SGCA 35, CA (refd)
Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd [2016] MLJU 64; [2016] 3 CLJ 403, CA (refd)
Soh Beng Tee & Co Pte Ltd v Farimount Development Pte Ltd [2007] 3 SLR(R) 86, CA (refd)
Tanjung Langsat Port Sdn Bhd v Trafigura Pte Ltd [2016] 4 CLJ 927 (refd)
Trustees of Rotoaira Forest Trust v Attorney General [1999] 2 NZLR 452, HC (refd)
Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors [2016] 1 MLJ 200, FC (refd)

Legislation referred to

Arbitration Act 2005 ss 20, 37, (1), (1)(a), (1)(a)(iv), (1)(a)(v), (1)(b), (1)(b)(ii), (2)(b), (2)(b)(ii), (3), 42, 42(4)(d)
Arbitration Act [NZ] Schedule 1, r 34(2), Appendix 1, art 34(2)

Arbitration Act 2001 [SG] s 48, 48(1)(a)(iv), (1)(a)(vii)
International Arbitration Act [SG] s 24(b)
Interpretation Acts 1948 and 1967 s 17A

Appeal from: Civil Appeal No W-02(NCC)(A)-1430–09 of 2015 (Court of Appeal, Putrajaya)

Cyrus Das (Gan Khong Aik and Lee Sze Ching with him) (Gan Partnership) for the appellant.
Malik Imtiaz (Surendra Ananth and Wong Ming Yen with him) (Malik Imtiaz Sarwar) for the respondent.

Vernon Ong FCJ:

INTRODUCTION

[1] The questions of law for which leave was granted concerns the interpretation of s 37 of the Arbitration Act 2005 ('the AA 2005'). Essentially, it relates to the question of: (a) whether the High Court is bound to set aside an arbitration award as a matter of course where a complaint of breach of the rules of natural justice is established; and (b) whether the High Court is bound to set aside the whole award where the complaint in respect of only one of three principal issues before the arbitrator is made out. For the purposes of this appeal, it is necessary to appreciate the salient background facts.

BACKGROUND FACTS

[2] Pursuant to a charter party agreement ('CPA'), Master Mulia ('the appellant') hired out its vessel to Sigur Ros ('the respondent') for undersea pipe-lines installation works in the high seas. Installed on the vessel was a pipeline installation arm called a stinger hitch which was essential to the works. Under the CPA, the respondent was to redeliver the vessel on or before the expiry of the charter period on 26 January 2013; in default thereof, the respondent was liable to pay a certain daily sum until the redelivery. As the stinger hitch was damaged on 9 January 2013, the respondent suspended works and carried temporary repairs to the damaged stinger hitch to enable it to complete the remaining works.

[3] The vessel was redelivered to the appellant on 5 March 2013, a period of 37 days after the due redelivery date. The appellant claimed for the charter hire calculated up to 22 May 2013 being the date after the vessel had been dry-docked for reinstatement works. For this extended period from the redelivery date to the date that the vessel was reinstated, the appellant claimed a sum of USD3,968,279. The appellant also claimed for the damage to the stinger hitch and the cost of reinstatement and other claims including

replacement or replenishment of consumables and other equipment on the vessel and for damages for failing to extend the bank guarantee ('BG') under the CPA. The respondent disputed the claim and contended that the damage was due to an inherent weakness in the stinger hitch.

[4] As a result of the dispute, the appellant initiated arbitral proceedings against the respondent. The arbitration was held under KLRCA auspices and was a domestic arbitration. The arbitrator decided in favour of the appellant whereby the respondent was required to pay to the appellant the sum of USD3,023,269.52 together with pre-award interest of USD82,332.33, the sum of RM502,141.47 towards repair and reinstatement of the vessel and post-award interests ('the award').

[5] The respondent applied to the High Court to set aside the award pursuant to ss 37 and 42 of the AA 2005. For the purposes of this appeal, it suffices to note that the respondent relied primarily on two principal grounds: (a) that the award was issued in breach of the rules of natural justice and, as such, was contrary to public policy under sub-ss 37(1)(b)(ii) and (2)(b); and (b) that the award went beyond the scope of submission to arbitration under sub-s 37(1)(a)(iv) of the AA 2005.

[6] The High Court found that the award was in breach of the rules of natural justice to an extent that s 20 of the AA 2005 on equal treatment of parties was contravened. Notwithstanding that finding, the High Court affirmed the award principally on the ground that the respondent failed to show that it suffered actual or real prejudice arising from the breach of the rules of natural justice.

[7] The respondent appealed to the Court of Appeal. The appellant did not cross-appeal against the High Court's findings that s 20 of the AA 2005 had been contravened by reason of a breach of natural justice.

[8] The Court of Appeal allowed the appeal and set aside the award. It concluded that there had been a breach of the rules of natural justice sufficient in gravity to set aside the award.

[9] It was against this backdrop that this court granted leave on the following questions of law:

Question 1

Whether the High Court exercising jurisdiction under s 37 of the AA 2005 is bound to set aside an arbitration award as a matter of course if any of the grounds of challenge under ss 37(1) or (2) is made out by a plaintiff other than a complaint falling under s 37(3)?

Question 2

Where the complaint by the plaintiff under s 37 of the AA 2005 is only in respect of one of three principal issues before the Arbitrator or where the plaintiff's case is made out only in respect of one out of three issues, whether the High Court is obliged as a matter of law under s 37 to set aside the whole Award?

Question 3

Where a plaintiff has made an application jointly under s 37 and s 42 of the AA 2005 to set aside or vary an Award, and where only part of the Award is found to be bad in law, whether the Court would be entitled to invoke its powers under s 42(2) to set aside the Award in part or to vary it accordingly?

Question 4

Where breach of natural justice is raised as a ground to set aside an arbitration award under s 37(1)(b)(ii) and s 37(2)(b) of the AA 2005, is it sufficient for the plaintiff to prove the alleged breach of natural justice without also establishing that the alleged breach would have made a difference to the outcome of the case?

FINDINGS OF THE HIGH COURT ON BREACH OF THE RULES OF NATURAL JUSTICE

[10] The questions of law arose as a result of the High Court deciding not to set aside the award notwithstanding its finding there had been a breach of natural justice committed by the arbitrator in the arbitral proceedings. Accordingly, it is important to advert to the key findings of the High Court insofar as they relate to the impugned conduct of the arbitrator and which conduct was found to be in breach of the rules of natural justice:

(a) the learned judge rejected the respondent's application to set aside the award under sub-s 37(1)(a)(iv) of the AA 2005 on the following grounds:

(i) the arbitrator had decided on all the matters which have been submitted by the parties to arbitration ('the submitted matters'); and

(ii) the arbitrator has not decided — (a) any dispute which is not contemplated by the submitted matters; (b) any dispute which does not fall within the submitted matters; or (c) a new dispute decided by the arbitrator which was not contemplated by the submitted matters or which did not fall within the submitted matters ('new difference').

(b) the arbitrator has committed (a) a breach of his duty under s 20; and (b) a breach of the second rule of natural justice within the meaning of s 37(1)(b)(ii) and (2)(b) of the AA 2005 ('the two breaches') in the following manner:

(i) the arbitrator failed to inform the parties of the two items of

extraneous evidence that the arbitrator might rely on and which the arbitrator did indeed subsequently rely on ('the natural justice issue'); and

(ii) the arbitrator had failed to give the parties an opportunity to — (a) test the two items of extraneous evidence; (b) adduce admissible evidence, including expert evidence, to prove or disprove the existence of the two items of extraneous evidence, and/or corroborate or rebut the two items of extraneous evidence and (c) submit in writing and/or orally, in respect of the two items of extraneous evidence ('the jurisdiction issue').

(c) before the court can set aside an award for the two breaches, a plaintiff should show that the two breaches have prejudiced him or her. The learned judge gave three reasons — (i) even if the two breaches have been proven, the court has a discretion not to set aside an award under s 37(1) of the AA 2005; this is clear from the use of the permissive word 'may' in s 37(1); (ii) if the two breaches have not prejudiced a plaintiff, in that the two breaches are merely technical, the court's discretionary power to set aside an award under s 37(1) should not be exercised in vain as no injustice has been caused to the plaintiff by the two breaches; and (iii) the above requirements of proof of prejudice to the plaintiff due to the two breaches, is consistent with the four considerations to ensure, among others, party autonomy, finality of awards and a 'minimalist judicial intervention' approach;

(d) even though the arbitrator committed the two breaches, the plaintiff has not suffered any actual or real prejudice which will warrant judicial intervention in this case. First, there were three principal issues to be decided by the arbitrator, namely: (i) under the CPA, whether the charter period had been extended to 22 May 2013; (ii) whether the plaintiff should have been extended the BG under cl 43, and (iii) the determination of causation of damage to the vessel and liabilities arising therefrom. Paragraph 407 of the award which concerned the cause of damage to the vessel does not affect the first and second principal issues. Second, para 407 was part of the third principal issue in respect of which the arbitrator had made a finding that the vessel did not have a latent damage at the time of the commencement of the charter period, that the defendant had discharged its obligations to deliver the vessel in a seaworthy condition; that the damage to the stinger hitch was caused while the plaintiff had management and control of the vessel, including the stinger hitch; and that since the plaintiff had effected structural alteration to the vessel by welding the detachable stinger hitch to the hull of the vessel, and that to remove this structural alteration, the vessel needed to go to a dry dock to be reinstated to its original condition. And that the plaintiff should be liable to the defendant for the cost of repair

and reinstatement. Third, the arbitrator's findings on the third principal issue are based on the evidence and submission at the arbitral proceedings. Fourth, the arbitrator has given adequate and detailed reasons for his findings on the third principal issue. Fifth, the learned judge did not think that the two breaches could have 'materially affected' the arbitrator's findings on the third principal issue and the final outcome of the award. Further, the learned judge could not discern any actual or real prejudice to the plaintiff caused by the two breaches (*Soh Beng Tee & Co Pte Ltd v Farimount Development Pte Ltd* [2007] 3 SLR(R) 86 CA; *AKM v AKN and Anor* [2014] 4 SLR 245); and

(e) if the two breaches can be proved and have caused actual or real prejudice to the plaintiff, the court may set aside the entire award under s 37(1) of the AA 2005. The court has no power to set aside part of any award which may contain a matter which has not been submitted to arbitration (*Ahmani Sdn Bhd v Petronas Panapisan (Melaka) Sdn Bhd* [2015] 11 MLJ 32).

DECISION OF THE COURT OF APPEAL

[11] The Court of Appeal allowed the respondent's appeal and set aside the entire award under s 37(1)(a)(iv) and (b)(ii) of the AA 2005. At para [34] of the written judgment it held:

> [34] [W]here such a breach within the terms of section 37(1)(b)(ii) read with section 37(2)(b) has been established, it is the whole award that will be set aside. The terms of section 37 do not appear to allow for the operation of the principle of severance, especially in view of the terms of section 37(3) read with section 37(1)(a)(v). Subsection 37(3) provides that where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside. The words 'matters submitted to arbitration can be separated from those not so submitted' are peculiar to the terms appearing in section 37(1)(a)(v), the only provision which makes specific reference to section 37(3), that it is read 'subject to subsection (3) ...

And at para [35]:

> [35] ... This brings us to the necessary conclusion that where the award conflicts with the public policy of Malaysia [where there is a breach of the rules of natural justice], it is the whole award which will be set aside, and not only a suggested part of the award.

And at paras [87] and [90]–[92]:

> [87] One of the three central issues submitted to arbitration was the cause of damage. In this regard, the respondent (Master Mulia) in its Amended Points of

Claim with legal counsel, had chosen to frame the cause as one grounded in negligence, with specific contentions of how the negligent acts were committed. The conduct of the parties and the manner in which the arbitration was conducted further reflect and consistently kept to those agreed defined limits. In fact, in their Submissions on Legal Issues, the respondent defined its complaint and its claim in even clearer terms, that it was requiring the arbitrator to determine 'Whether there was any negligence on the part of the respondent (Sigur Ros) in relation to the incident on 9.1.2013.' The respondent (Master Mulia) had further pleaded that the structural alteration caused by the appellant (Sigur Ros) were directly linked to the incident on 9.1.2013. This submission invited response submissions on the same from the appellant (Sigur Ros), where the appellant (Sigur Ros) denied the same and required the respondent (Master Mulia) to prove its claims, that the appellant's (Sigur Ros) negligent act in operating and/or handling the stinger hitch had caused the structural alteration and modification to the vessel. (parenthesis added)

[90] Viewed from this objective perspective, it can only reasonably be concluded that these two pieces of extraneous evidence were indeed relevant and material to the question of causation of the damage to the stinger hitch. This question of causation had so vexed the parties that it was at the very heart of the dispute between them. These two pieces of extraneous evidence supposedly answered the question of causation, as it led the learned Arbitrator to readily conclude that 'on a balance of probabilities, ... the damage is sustained due to continuing operations of the Stinger and the Vessel in severe weather conditions by the plaintiff, prior to and on the day the damage was discovered.'

Yet, these two pieces of critical and material evidence were never indicated to the parties, until the award was rendered, by which time it was too late. The case that was run by the parties from the moment of definition to the time of the award; had been redefined by the arbitrator without giving the parties an opportunity to present their responses. This redefinition brought a new difference to the dispute which also renders the Award liable to be set aside under section 37(1)(a) — see *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617.

[91] Without these two pieces of extraneous evidence and thereby this conclusion, the arbitrator could not have been in the position to make the orders for monetary compensation in the form of payment for the extended period of charter hire and the costs of repair and reinstatement that were mentioned at the outset of this judgment — the sum of USD3,023,269.52 for the outstanding charter hire payments, and the sum of RM502,141.47 towards repair and reinstatement of the vessel, reimbursable items and BG, together with interest. These two instances of breach of the rules of natural justice, viewed objectively can only reasonably be said to have had a huge impact on the effect of the outcome of the arbitration.

[92] Again, without these two pieces of evidence which were never put to the parties, the arbitration would also have reached a different conclusion. At that point in his deliberations, inasmuch as the arbitrator had rejected the appellant's defences, that the stinger hitch was already damaged earlier or had a hidden latent damage and the respondent had thereby discharged its obligations of delivering the vessel in a seaworthy condition, the arbitrator had also rejected the respondent's claim that the appellant was negligent in causing the damage to the stinger hitch.

SUBMISSION OF APPELLANT COUNSEL

[12] The written submissions of counsel for the parties having been filed earlier and taken as read, we heard the oral submissions of counsel. Learned counsel for the appellant began his argument by saying that the High Court was correct and that the Court of Appeal has made a far-reaching conclusion with far-reaching implications that the whole award must be set aside although only part of the award was infected with error. The Court of Appeal erred in holding such a viewpoint could be inferred as 'implicit' from the earlier Court of Appeal decision in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] MLJU 64; [2016] 3 CLJ 403 (CA) because there was no categorical holding in that case that the whole award must be set aside if only a part is bad in law.

[13] It was then argued that the Court of Appeal erred in holding that unless the case fell within s 37(3) the whole award must necessarily be struck down. It leads to an injustice where only part of the award was bad in law but the whole award was nevertheless struck down. In adopting a strict reading of s 37(3), the Court of Appeal had ignored the 'residual discretion' factor vested in the opening words of s 37(1) which speaks in non-mandatory terms that 'an award may be set aside ...'. Section 37(1) governs both limbs (a) and (b); as such, the court is given a discretion not to set aside an award. Those words affirm the position that setting aside is permissive and not mandatory even if a complaint is made out (*Government of India v Cairns Energy India Pte Ltd* [2014] 9 MLJ 149). The discretionary power of this nature is called a 'residual discretion' which is followed in the Model Law countries like Hong Kong, Singapore and New Zealand based on article 34 of the Model Law (*Butterworths Hong Kong Arbitration Law Handbook* (2012 Ed) at p 329; *Singapore Law on Arbitral Awards* (Chan Leng Sun, SC, Academy Publishing) at para 6.142; *Arbitration in Malaysia: A Practical Guide* (Sweet & Maxwell, 2017 at p 365).

[14] Counsel also argued that s 37(1) of the AA 2005 is in pari materia with article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (Model Law) which is adopted verbatim in Hong Kong, Singapore and New Zealand. The word 'may be set aside' are read as militating against an automatic setting aside of an award once a breach is made out (*Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2015] 3 NZLR 644). *Citing Williams & Kawharu on Arbitration* (2nd Ed 2017) at pp 483–484, learned counsel submitted that awards should not be set aside for technical or inconsequential errors. The court's discretion under s 37 must be exercised with regard to the policies underpinning the AA 2005. The court will pay particular attention to the purposes of encouraging arbitration as a method of dispute resolution and facilitating the recognition and enforcement of arbitral awards. Use of the discretion enables the High Court to balance arbitral finality

with the need to protect parties against seriously flawed arbitrations. To determine the consequence of an error, the court may take into account causation and materiality considerations. Thus, even if a ground for setting aside is present, the court may consider the magnitude of the defect and the extent to which it had or might have had an impact on the outcome of the dispute, and particularly whether the tribunal might have reached a different conclusion had it adopted the correct approach. If the complaint is that a party was denied the opportunity to present its case, where it can be demonstrated that an argument, although tenable, is very unlikely to produce any materially different outcome on re-argument, then that is a legitimate factor against granting relief (*Brunswick Bowling & Billiards Corporation v Shanghai Zonglu Industrial Co* (2011) 1 HKLRD 7070). As such, learned counsel argued that a non-material error is an error which is not material to the outcome, and not just an error which is trivial or not serious (*Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* [2012] HKLRD 1 (CA)). Learned counsel also argued that the Federal Court in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413; [2019] 1 CLJ 1 (FC) at para [56] appeared to disagree with the Court of Appeal in this case.

[15] Based on the authorities cited, learned counsel argued that it is incorrect that s 37 leaves no discretion in the review court once an error is discovered but for the court to set aside the whole award. It was argued that the review court is obliged to consider the materiality of the defect and its impact on the outcome of the dispute. In particular, the court would as a matter of fairness be obliged to balance the consequences of setting aside the whole award to the prejudice of the successful party merely on the ground that the unsuccessful party had established an error in part of the award. Therefore, it was submitted questions 1 and 2 should be answered in the negative.

[16] Moving to question 3, learned counsel for the appellant argued that as the application to set aside the award was made under ss 37 and 42 of the AA 2005, the court has wider powers under s 42(4)(d) to set aside only part of the award; in so doing, justice would have been better served if the Court of Appeal could have saved the good part of the award and limited the relief to the actual complaint of the respondent by setting aside only that part which is bad in law; further, both ss 37 and 42 are engaged where there is a challenge to a domestic arbitration award (*Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2015] 1 CLJ 617 (CA); *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd*; *Far East Holdings Bhd v Majlis Ugama Pahang* [2018] 1 MLJ 1 (FC)). Counsel submitted that question 3 should be answered in the affirmative.

[17] Question 4 deals with the issue of whether it is sufficient to establish breach of natural justice without showing that the breach would have made a

A difference to the outcome of the case. Counsel argued that the Court of Appeal took a complex position. First, the Court of Appeal said that the breach of natural justice must be material and that the High Court was wrong to follow Singapore decisions as s 48 of the Singapore Arbitration Act 2001 statutorily provides that a breach of natural justice must have a material prejudicial effect. B However, the Court of Appeal then went on to say that the High Court was not wrong in examining whether it had a prejudicial effect and concluded that the High Court was wrong in saying that there was no prejudicial effect and found that it did have a prejudicial effect. Learned counsel argued that the upshot of a natural justice complaint is that it must not be inconsequential. In the context C of this case, the vital question is whether the breach made a difference to the outcome of the arbitrator's decision on this issue. The High Court was clear on this point that although there was a natural justice breach in respect of the third principal issue only there were other reasons that justified the arbitrator's conclusion on this point. The third principal issue would have been decided in D the same way notwithstanding the breach of natural justice as there were other grounds relied on by the arbitrator which justified his conclusion. As such, where there are several supporting grounds for a decision, the inadequacy of one ground will not invalidate the decision of the arbitrator (*Brunwick Bowling*; *Tanjung Langsat Port Sdn Bhd v Trafigura Pte Ltd* [2016] 4 CLJ 927). E Therefore, counsel argued that question 4 should be answered in the negative.

SUBMISSION OF RESPONDENT COUNSEL

[18] The respondent's overall position are as follows. Question 1 should also F be answered in the negative. That for a complaint under s 37(1)(b)(ii) read together with s 37(2)(b), the High Court should only set aside the award if the breach of the rules of natural justice was significant or material. If s 20 of the AA 2005 is breached, the entire award must be set aside. For other grounds in s 37(1)(a), it would depend on the seriousness of the breach. Generally, G breaches of some grounds are more serious than others. For jurisdictional complaints under s 37(1)(a)(iv) and (v), the award should be set aside if it is found that a 'new difference' within the meaning of *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] SGCA 35 was introduced by the arbitrator. Questions 2 ought not to be answered as the H complaint was made out in respect of all primary issues. In any event, for breaches of any ground besides s 37(1)(a)(v), the entire award must be set aside. On the same footing, question 3 ought not to be answered as the entire award was found to be bad in law. As for question 4, the plaintiff must show that the breach of the rules of natural justice is significant or material. Prejudice is not I a pre-requisite or requirement to set aside an award under s 37(1)(b)(ii) and (2)(b).

[19] Learned counsel for the respondent submitted that at the High Court, the respondent premised their application to set aside the award under ss 37

and 42 of the AA 2005. The respondent relied on two grounds under s 37 — (i) breach of natural justice; and (ii) new difference point, namely that the arbitrator had decided something beyond the scope of the arbitration. In the Court of Appeal, the arguments centered on s 37. Section 42 did not feature at all. As such, the appellant's argument that the court should have invoked s 42 is without basis. The Federal Court should not be looking at s 42 at all.

[20] In the High Court, the learned judge found that there was a breach of natural justice but no prejudice was shown. In interpreting s 37, the Court of Appeal considered the respective positions in Singapore and New Zealand. It was submitted that the Court of Appeal was correct in preferring the New Zealand position in interpreting s 37. Therefore, the respondent is not required to show actual prejudice; at any rate, prejudice is not a mandatory pre-requisite. The Singapore position on natural justice is based on s 22 of the Singapore Act which mirrors s 20 of the AA 2005. Likewise, s 48(1)(a)(iv) of the Singapore Act which mirrors s 37(3) of the AA 2005 provides for the setting aside of only part of an award which contains decisions not submitted for arbitration. In relation to breach of natural justice, whereas s 48(1)(a)(vii) of the Singapore Act incorporates elements of prejudice, that element is absent in our sub-ss 37(1)(b)(ii) and (2)(b)(ii) of the AA 2005. Therefore, insofar as the requirement of actual or real prejudice is concerned, the Singapore position is inapplicable in Malaysia. Adopting the Singapore standard would be to import too high a threshold. Counsel cautioned against the appellant's argument that all laws are similar for being based on the Model Law. Instead, statutes can only be construed with settled rules of statutory interpretation.

[21] The respondent accepted that setting aside an award was a matter of discretion for the court; and that it depended on the seriousness or materiality of the breach. The respondent has shown the materiality of the breach which was considered by the Court of Appeal. The materiality of the breach in question related to two pieces of extraneous evidence considered by the arbitrator in making a finding on the question of causation of damage to the stinger hitch. Despite the fact that this question was at the very heart of the dispute between the parties, the arbitrator never indicated these two pieces of evidence to the parties until the award was rendered, by which time it was too late. As such, the case that was run by the parties from the moment of definition to the time of the award had been redefined by the arbitrator without giving the parties an opportunity to present their responses. This redefinition brought a new difference to the dispute which also renders the award liable to be set aside under s 37(1)(a).

[22] The High Court had found that the arbitrator committed the two breaches under ss 20, 37(1)(b)(ii) and 37(2)(b). Therefore, for the learned judge to hold that the breach was not material was a contradiction in terms.

[23] Further, article 34(2)(a)(iii) of the Model Law on applications to set aside an award is alike s 48(1)(a)(iv) of the Singapore Act and r 34(2) of Schedule 1 (rules applying to arbitration generally) of the New Zealand Arbitration Act ('the NZ Act'). Article 34(2)(a)(iii), s 48(a)(a)(iv) and r 34(2) are similarly formulated along the lines of article V(1)(c) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('New York Convention') in that the two jurisdictional complaints, vis: (i) an award deals with a dispute not contemplated by or falling within the terms of the submission to arbitration; and (ii) an award which contains decisions on matters beyond the scope of the submission to arbitration, are contained in a single clause. In contrast, our s 37 of the AA 2005 provides two subsections for the 'terms of the submission to arbitration' (sub-s (1)(a)(iv)), and 'scope of the submission to arbitration' (sub-s (1)(a)(v)). And only sub-s 37(1)(a)(v) is made subject to sub-s 37(3) which allows for severance of part of an award. As such, precedents from other jurisdictions cannot override the clear language and words of s 37 of the AA 2005.

DECISION

[24] The principal issue in this appeal centres on the interpretation to be given to s 37 of the AA 2005. Section 37 reads as follows:

> 37 *Application for setting aside*
>
> (1) An award *may be set aside* by the High Court only if —
>
> (a) *the party making the application provides proof that* —
>
> (i) a party to the arbitration agreement was under any incapacity;
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it to, or, failing any indication thereon, under the laws of Malaysia;
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
>
> (iv) the award deals with a dispute not contemplated by or not falling *within the terms of the submission to arbitration*;
>
> (v) subject to subsection (3), the award contains decisions on *matters beyond the scope of the submission to arbitration*; or
>
> (vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or
>
> (b) the High Court finds that —

(i) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of subparagraph (1)(b)(ii) an award is in conflict with the public policy of Malaysia where —

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred —

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) *Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.*

(4) ...

(5) ...

(6) ...

(7) ... (Emphasis added.)

[25] To recap, the appellant's main argument is that the Court of Appeal erred: (i) in adopting a strict reading of s 37 which led to an injustice as only part of the award was bad in law but the whole award was struck down; and (ii) in ignoring the 'residual discretion' factor vested in s 37(1), which discretionary power is followed in the Model Law countries like Hong Kong, Singapore and New Zealand based on article 34 of the Model Law. As such the Court of Appeal's failure to exercise its residual discretion under s 37(1) is a serious misdirection in law which should be corrected. It was strenuously urged upon this court that as s 37(1) of the AA 2005 is in pari materia with article 34(2) of the Model Law, and which was also adopted verbatim in Hong Kong, Singapore and New Zealand, the approach in those countries should be adopted. Accordingly, the High Court was correct in exercising its residual discretion under s 37(1) in deciding not to set aside the award because the breach was not material.

[26] The appellant's arguments bring to fore the question of the applicability of the Model Law and the law of the Model Law countries as an aid in the interpretation of s 37 of the AA 2005. The appellant takes the strident position that s 37 of the AA 2005 should be interpreted along the same lines as that of article 34 of the Model Law and the equipollent provisions of the Hong Kong, Singapore and New Zealand arbitration enactments.

[27] In construing a statute effect must be given to the object and intent of the legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. This is consonant with s 17A of the Interpretation Acts 1948 and 1967 which provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the Legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court 'to travel outside them on a voyage of discovery are strictly limited.' Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance. An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself (*Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors* [2016] 1 MLJ 200 (FC); *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590; [2017] 1 LNS 296 (FC); *Merck KGaA v Leno Marketing (M) Sdn Bhd (Registrar of Trade Marks, interested party)* [2018] 5 MLJ 1; [2018] 6 CLJ 167 (FC); *Fairise Odyssey (M) Sdn Bhd v Tenaga Nasional Bhd* [2019] 6 MLJ 281; [2019] 8 CLJ 20 (FC); *Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals* [2020] 1 MLJ 311; [2019] 6 MLRA (FC); *Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal* [2020] 1 MLJ 174; [2020] 1 CLJ 299 (FC); *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1; [2020] 1 LNS 57 (FC)).

[28] The AA 2005 was drafted based on the Model Law with amendments

in 2006. This was made clear by the then Minister who introduced the Bill for the AA in the House of Representatives on 7 December 2005 (Penyata Rasmi Parlimen Dewan Rakyat, 7 December 2005, p 95). In this connection, the AA 2005 has many similarities with arbitration enactments in Singapore, India, Canada, United Kingdom and New Zealand. According to learned authors Sundra Rajoo and WSW Davidson of the book *The Arbitration Act 2005: UNICTRAL Model Law as applied in Malaysia,* (Sweet & Maxwell Asia, 2007), the New Zealand Act is the closest in degree of similarity to the AA 2005.

[29] We do not think that it is really a point of contention that the respective enactments of Hong King, Singapore and New Zealand are based on the Model Law. It would, however be instructive to consider the historical and jurisprudential setting to the New York Convention and the Model Law and how and why the Model Law came about to be adopted in different jurisdictions.

[30] It is commonly accepted that the precursor to the Model Law was the New York Convention and that in the drafting and finalisation of the Model Law, due account was taken of the New York Convention. So, in what manner does the AA 2005 fit in the overall scheme of the New York Convention and the Model Law.

THE NEW YORK CONVENTION

[31] According to the *UNICTRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958, 2016 Ed) the New York Convention is one of the United Nations' treaties in the area of international trade law. Although the New York Convention, adopted by diplomatic conference on 10 June 1985, was prepared by the United Nations prior to the establishment of the United Nations Commission on International Trade Law (UNCITRAL), promotion of the New York Convention is nevertheless an integral part of UNCITRAL. The objective of the New York Convention is to facilitate the recognition and enforcement of arbitral awards to the greatest extent possible and to provide a maximum level of control which contracting States may exert over arbitral awards. The New York Convention is a comprehensive and far-reaching document comprising Articles I to XVI. It is widely recognized as a foundational instrument of international arbitration and requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognise and enforce awards made in other States, subject to specific limited exceptions. The New York Convention took effect on 7 June 1959, and there are to date 161 State parties to the New York Convention; Malaysia, Singapore and New Zealand are State parties. Since its inception, the New York Convention's regime for recognition and enforcement

has become deeply rooted in the legal systems of its contracting States and has contributed to the status of international arbitration as today's normal means of resolving commercial disputes. Even though the New York Convention imposes strict rules on recognition and enforcement of foreign arbitral awards, contracting States are granted the discretion to determine the applicable rules for recognition and enforcement so long as, in doing so, they do not impose 'substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards [...] than are imposed on the recognition or enforcement of domestic arbitral awards' (article III of the New York Convention).

[32] Article V of the New York Convention sets out the limited and exhaustive grounds on which recognition and enforcement of an arbitral award may be refused by a competent authority in the contracting State. The grounds for refusal under article V do not include an erroneous decision in law or in fact by the arbitral tribunal. A court seized with an application for recognition and enforcement under the New York Convention may not review the merits of the arbitral tribunal's decision. In keeping with the pro-enforcement bias of the New York Convention, article V(1)(c) provides 'that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced', provided that matters properly within the scope of the arbitration agreement 'can be separated from those not so submitted'. The severability provision of article V(1)(c), permitting the part of an award to be recognised and enforced where it does address issues within the scope of the submission to arbitration, is consistent with the aim of the New York Convention to facilitate the enforcement of arbitral awards. Article V of the New York Convention reads as follows:

New York Convention — Article V

1. Recognition and enforcement of the award *may* be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

   (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it to or, failing any indication thereon, under the law of the country where the award was made;

   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

   (c) The award deals with a difference not contemplated by or *not falling within the terms of the submission to arbitration*, or *it contains decisions on matters beyond the scope of the submission to arbitration*,

provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, *that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced*; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country. (Emphasis added.)

MODEL LAW

[33] In the light of the backdrop to the New York Convention, we will now delve briefly into Michael F. Hoellering's illuminative paper on the Model Law. Hoellering was a member of the United States Delegation to the UNCITRAL Working Group on International Contract Practices, which drafted the Model Law. In his article *The UNCITRAL Model Law on International Commercial Arbitration* (*The UNCITRAL Model Law on International Commercial Arbitration,* 20 Int'l L 327 (1986) *https://scholar.smu.edu/til/vol20/iss1/19*) Hoellering sets out a brief description of the background of the Model Law, its guiding principles, and the structures and features of the Model Law.

[34] According to Hoellering the project to develop a model law was conceived in 1979 when, after a review of favourable experience over the past twenty years with the 1958 New York Convention, UNCITRAL concluded that a protocol to the New York Convention was not necessary, but that further work on a model law 'could assist States in reforming and modernizing their law on arbitration ... reduce divergencies encountered in the interpretation of the 1958 Convention ... and minimize the possible conflicts between national laws and arbitration rules'. Thus it was decided that the project should be in the form of a model law, and that due account should be taken of the New York Convention and of the UNCITRAL Arbitration Rules.

[35] Hoellering premised his article on the footing that the new model law

was intended to serve as a model of domestic arbitration legislation, harmonising and making more uniform the practice and procedure of international commercial arbitration while freeing international arbitration from the parochial law of any given adopting state. The work was undertaken by the Working Group in February, 1982 and proceeded over the course of five sessions, and, in February, 1984, a draft model law was completed and circulated for comment to governments and international organisations. The Model Law was finalised after the various comments received were considered.

[36] Five basic principles underscored the drafting of the model law. The first was party autonomy; the entire scheme of the model law provides for a wide scope of party autonomy — '… the freedom of the parties … to tailor the 'rules of the game' to their specific needs'. The Model Law expressly permits the parties to specify the international nature of the arbitrable subject matter (article 1(3)(c)); choose institutionalized arbitration and rules (article 2(d)); agree on the manner in which written communications are deemed received (article 3(1)); determine the number of arbitrators (article 10(1)); determine the procedure for arbitrator appointment (article 11(2)); agree on a procedure for arbitrator challenge (article 13(1)); determine the procedure for conduct of the arbitral proceedings (article 21); determine the language(s) to be used (article 22(1)); agree to the manner and time frames governing presentation of claims (article 23(1)); agree to oral hearings (article 24(1)); agree as to defaults (article 25); and experts appointed by the tribunal (article 26); choose the law(s) which will govern the proceedings (article 28(1)); and authorise the arbitrators to decide *ex aequo et bono*(*ex aequo et bono* is a Latin phrase that is used as a legal term of art. In the context of arbitration, it refers to the power of arbitrators to dispense with consideration of the law but consider solely what they consider to be fair and equitable in the case at hand) or as *amiable compositeur* (*Amiable compositeur* is a Latin phrase which refers to an unbiased third party) (article 28(3)).

[37] The second basic principle underlying the Model Law was consistency with the New York Convention and UNCITRAL Arbitration Rules. The Model Law was drafted to promote the policies and principles underlying both the New York Convention and various institutional and the UNCITRAL Arbitration Rules; there was also agreement that the basic principles of the UNCITRAL Arbitration Rules, generally recognized for their neutrality and comprehensiveness, should be maintained to their greatest extent possible.

[38] Third, the Model Law adopted broad definitions of the word 'international' because of the special needs of transnational dispute resolution and the word 'commercial' because the term has been defined differently by states. It was deemed important to define these terms widely, so as to apply to the broadest range of international commercial transactions, thus adding

certainty to the dispute settlement mechanism applicable to such transactions. A

[39] The fourth key concept of the Model Law is that of limited and clearly defined instances of court intervention into the arbitration process, with a curtailed right of appeal from a court decision sought during the pendency of the arbitral proceedings. The role of the courts in general is one of assistance supportive of the arbitral process and not one of interference with it. The approach of the Model Law, which allows prompt recourse to court during the arbitral proceedings, but simultaneously permits the arbitration to go forward, represents a balance between the potential for delay through dilatory tactics of a recalcitrant party, and the futility and high cost of arbitral proceedings in which the award is ultimately set aside by the court. B C

[40] The fifth guiding principle underlying the Model Law is broad arbitrator authority. The arbitrators are given expansive power to make certain decisions, subject only to contrary agreement of the parties. It is empowered to decide on challenges to a given arbitrator (article 13(2)); rule on its own jurisdiction (article 16); order interim measures for protection or provide security (article 18); determine the procedure for conduct of the arbitration and admissibility of evidence (article 19(2)); determine the place of arbitration (article 20); determine the language of the proceedings (article 22); decide whether to hold oral hearings where such hearings are not requested (article 24(1)); terminate or continue proceedings on default of a party duly notified (article 25); appoint experts to assist the tribunal (article 26); request court assistance in the taking of evidence (article 27); decide the controversy in accordance with the applicable rules of law (article 28); correct facial errors in the award on its own initiative within 30 days (article 33(2)); and extend the period of time for such corrections or interpretations of the award (article 33(4)). D E F G

[41] The Model Law is divided into eight chapters and 39 articles. It is intended as domestic law of the adopting state, subject to any international treaties, conventions or agreements in force between the adopting states and other states, and, by its own terms, as *lex specialis lex specialis* is a Latin phrase for the principle according to which special rules derogate from general ones, would be subordinate to any other domestic law affecting arbitration. For the purposes of this appeal, we will consider the article relating to recourse against award which is in Chapter VII under article 34. The grounds for setting aside an award are the same as those of the New York Convention, including non-arbitrability and public policy. Article 8 on natural justice and article 34 of the Model Law are as follows: H I

Model Law

Article 18 — Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 34 — Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award *may be set aside* by the court specified in article 6 only if:

(a) the party making the application furnish proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or *not falling within the terms of the submission to arbitration*, or *contains decisions on matters beyond the scope of the submission to arbitration*, provided that, *if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside*; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) The subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) The award is in conflict with the public policy of this State.

(3) ...

(4) ... (Emphasis added.)

[42] So much for the New York Convention and the Model Law. Learned counsel for the appellant argued strenuously that the discretionary power otherwise referred to as 'residual discretion' is followed in the Model Law countries. In support he referred to the position in Hong Kong and cited the *Butterworths Hong Kong Arbitration Law Handbook* (2012 Ed) which carries the following commentary at para [81:06]:

The court has a residual discretion to uphold an award, even if grounds for setting

it aside have been made out. The discretion to set aside an award is likely to be exercised very rarely in the light of the policy considerations underlying this article (as to which see [81.03] above) [Art 81 of the Hong Kong Arbitration Ordinance (Cap 609)] and if the court pursues an identical course to that adopted in relation to refusal of leave to enforce a New York Convention award: see cases cited by analogy in the notes to paragraphs (2)(a) and (b) below.

The Court must be satisfied that if the violation of procedure had not occurred, the award could not have been different. Thus, a 'procedurally unfair' award, can still be upheld, for instance by enforcement or refusal to set aside, if the court is satisfied that the eventual decision, had the violation not occurred, could not have been different (*Pacific China Holdings Limited (In Liquidation) v Grand Pacific Holdings Limited* Unreported, HCCT 15 of 2010.

[43] Likewise, the Singapore position on 'residual discretion' principle is to be found in the book entitled *Singapore Law on Arbitral Awards* (Chan Leng Sun SC, Academy Publishing) at para 6.142:

While Singapore legislation does not use the 'serious irregularity' test, the power given to the court to set aside an award is discretionary. Minor transgressions of procedure that cause no prejudice will probably be met with an appropriate exercise of the court's discretion because Article 34(2) of the Model Law 1985 is permissive, not mandatory as the award 'may' (not 'shall') be set aside if it falls within one of the stipulated grounds. This is consistent with what the Department Advisory Committee on Arbitration Law had observed as an internationally-accepted view to permit judicial intervention only when the transgression is serious.

[44] The 'residual principle' principle is also recognized in New Zealand. Learned counsel for the appellant argued that the New Zealand Act is the model for our AA 2005; in particular, the opening words of art 34(2) of Appendix 1 of the NZ Act provides in its opening words 'An arbitral award may be set aside by the High Court only if —' are similar to the opening words of our s 37(1).

[45] In the leading textbook on the NZ Act, *Williams & Kawharu on Arbitration* (2nd Ed 2017), the learned authors make this observation on the High Court's power of 'retaining a residual discretion' at pp 483–484:

The High Court retains a residual discretion not to set aside an award even though a ground for set aside may be made out. This is evident from the use of the word 'may' in the opening text of art 34(2). The existence of the discretion is also supported by the drafting history of art 34, and specifically the concern of the drafters of the United Nations Commission on International Trade (UNCITRAL), Model Law on International Commercial Arbitration 1985 (the Model Law) that awards should not have to be set aside for technical or inconsequent errors.

The Court's discretion under art 34 is unfettered, but it must be exercised with regard to the policies underpinning the NZ Act. The Court will pay particular

attention to the purposes of encouraging arbitration as a method of dispute resolution and facilitating the recognition and enforcement of arbitral awards.

Use of the discretion enables the High Court to balance arbitral finality with the need to protect parties against seriously flawed arbitrations. To determine the consequence of an error, the court may take into account causation and materiality considerations. Thus, even if a ground for setting aside is present, the court may consider the magnitude of the defect and the extent to which it had or might have had an impact on the outcome of the dispute, and particularly whether the tribunal might have reached a different conclusion had it adopted the correct approach. If the complaint is that a party was denied the opportunity to present its case, Dobson J in Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd said that:

> ... the relative tenability of an argument that was not addressed at all may have some influence on whether the relevant determination should indeed be set aside. Where it can be demonstrated that an argument, although tenable, is very unlikely to produce any materially different outcome on re-argument, then that is a legitimate factor against granting relief.

[46] In our considered view, the opening words of sub-s 37(1) which employs the terms 'may be set aside' is plain and unambiguous. Subsection 37(1) clearly provides that the High Court retains a residual discretion not to set aside an award even though a ground for setting aside may be made out. What is important is to ascertain the principles applicable to the exercise of such discretion in cases where an application is grounded on breach of the rules of natural justice.

[47] In *Pacific China Holdings Ltd (in liq)*, the arbitral award was set aside by the High Court on the grounds that the party making the application had been unable to present its case. On appeal, the Hong Kong Court of Appeal reinstated the award citing amongst others that: (i) alleged non-compliance with article 18 of the Model Law (Equal treatment of parties) was the primary foundation of an argument that a party was unable to present its case. The conduct complained of must be serious or even egregious before a court might take the view that a party had been denied due process; and (ii) only a sufficiently serious error might be regarded as a violation of article 18 of the Model Law, vis one that undermined due process. The court might refuse to set aside the award if it was satisfied that the tribunal could not have reached a different conclusion. How it exercised its discretion depended on its view of the seriousness of the breach, eg whether the party resisting enforcement had not been prejudiced or whether the error was non-material, ie an error that was not material to the outcome and not a merely trivial or non-serious error.

[48] In *Brunswick Bowling*, the party making the application to set aside the award contended, inter alia, that the tribunal did not canvass with the parties its secret view on contractual requirements under the law of the People's

Republic of China ('PRC') law before deciding the issue. The learned High Court judge found that in dealing with an arbitration in Hong Kong, the requirement of contractual validity under PRC law has to be decided on the evidence before the tribunal. The arbitrators were not appointed on account of their expertise in PRC law and the parties had no reason to expect the tribunal to adopt a view on PRC law which had not been canvassed in the course of the arbitration. The tribunal should have canvassed with the parties the particular provision in the PRC law on the topic and gave them an opportunity to respond before making a decision on the same. The failure of the tribunal to do so constituted a valid ground of complaint under article 34(2)(a)(ii) — that the party were unable to present his case. Notwithstanding the aforesaid, the court still has to consider whether the award under this head should be set aside as a matter of discretion. The learned judge opined that a party applying to set aside an award does not have to show that a violation under Art. 34(2) has caused substantial injustice. The learned judge adopted the jurisprudence under the New York Convention as a guide as to how the discretion under article 34 is to be exercised. In this case, even though the learned judge eventually set aside the award on other grounds, the learned judge declined to set aside the award on this ground. The learned judge found that the tribunal's undisclosed knowledge of PRC contractual requirements is a matter that had no real impact on the result and that even without such infraction, the tribunal would have reached the same conclusion.

[49] For completeness, the relevant section of the Hong Kong Arbitration Ordinance (HK Act) is reproduced below:

> Hong Kong Arbitration Ordinance (Cap 609)
>
> Section 81 — Article 34 of UNCITRAL Model Law (Application for setting aside as exclusive recourse against arbitral award)
>
> (1) Article 34 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(5) —
>
> ... (text of Art. 34 of the Model Law is reproduced in toto) (Parenthesis added.)

[50] In *Kyburn*, an arbitrator was appointed by the owner and principal tenant of a building for their disputed rent review. Prior to the arbitration hearing, the arbitrator had inspected the premises and was shown around the premises by a principal witness for the principal tenant. The arbitrator did not disclose that fact and when the owner discovered that fact, steps were taken to challenge the arbitrator's impartiality at the High Court. The High Court found that there had been an error on the part of the arbitrator but rejected the claim that his actions showed bias. It held that none of the grounds provided in article 34 of the First Schedule to the NZ Act for setting aside an award had been made out. The owner's appeal was dismissed. The New Zealand Court of Appeal held that: (i) a party making an application to set aside an award under

article 34 would have to establish both that there had been a breach of the rules of natural justice and error in the exercise of the High Court's discretion in refusing to set aside the award; (ii) the fact that the inspection occurred without the owner's representative and with the principal tenant's representative meant that there was a risk that adverse comments about the building might have been made. In those circumstances the arbitrator failed to treat the parties equally and was in breach of the rules of natural justice; (iii) a finding of a breach of the rules of natural justice did not mean that the arbitral award had to be set aside, as the court's power to do so was discretionary. The discretion enabled the court to evaluate the nature and impact of the particular breach against the policy background of both encouraging arbitral finality and protecting the parties against seriously flawed arbitrations. The policy of encouraging arbitral finality will dissuade a court from exercising the discretion when the breach is relatively immaterial or was not likely to have affected the outcome. Where the breach is significant and might have affected the outcome courts are inclined to set aside the award. In some cases, the significance of the breach may be so great that the setting aside of the award will be practically automatic, regardless of the effect on the outcome of the award; (iv) the NZ Act did not place the onus on the party alleging breach of natural justice to make out that its consequences were sufficiently material to warrant setting aside the award. The discretion given to the court under the NZ Act was intended to confer a wide discretion dependent on the nature of the breach and its impact. Instead the materiality of the breach and the possible effect on the outcome are treated as relevant factors; and (v) in this case the arbitrator's breach of the rules of natural justice was significant, but the risk that something was said by the principal tenant's representative to the arbitrator did not have any material effect on the outcome of the rent review arbitration. The award correctly recorded the well-established legal principles to be followed, the arbitrator inspected comparable premises, and the award was based primarily on the arbitrator's evaluation of the expert valuation evidence adduced. It was an unexceptional rent review award. For context, article 34 of the NZ Act is reproduced below:

> *NZ Act — Schedule 1 (Rules applying to arbitration generally) Article 34. Application for setting aside as exclusive recourse against arbitral award*
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3).
>
> (2) An arbitral award *may be set aside* by the High Court only if —
>
> (a) the party making the application furnishes proof that —
>
> (i) a party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication on that question, under the law of New Zealand; or
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was

otherwise unable to present that party's case; or

(iii) the award deals with a dispute not contemplated by or *not* falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, *if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside*; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this schedule from which the parties cannot derogate, or, failing such agreement, was not in accordance with this schedule; or

(b) the High Court finds that —

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of New Zealand; or

(ii) the award is in *conflict with the public policy of New Zealand*.

(3) ...

(4) ...

(5) ...

(6) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if —

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred —

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award. (Emphasis added.)

[51] In *Soh Beng Tee* pursuant to a formal contract SBT was employed by Fairmount as the main contractor to construct a condominium, mock-up units and a substation. While the construction was in progress, SBT submitted numerous applications for extension of time. The architect granted a five day extension that extended the date of completion to 6 February 1999. Having failed to complete the project by 6 February 1999, SBT was served with a delay certificate in May 1999 in relation to the mock-up units, and again in July 1999 in relation to the main works. Following the issuance of a termination notice and a termination certificate by the architect, Fairmount terminated SBT's employment. In the course of the arbitration, three issues took centre stage. On the first issue, the arbitrator determined that the issuance of the

termination certificate was invalid as the wrong person had issued it. The arbitrator then decided that Fairmount had committed acts of prevention that set time for the performance of the project at large. Notwithstanding that finding, the arbitrator went on to find that the architect's grant of five days extension of time was not fair and reasonable in the circumstances and that SBT was entitled to a reasonable time to complete the project. Second, the arbitrator found that Fairmount could not rely on SBT's alleged repudiatory breach to justify the termination of its employment of SBT because time was not of the essence of the contract. Third, as Fairmount could not rightfully rescind its employment with SBT on the basis of a contractual termination, Fairmount's claim for liquidated damages was unsustainable because the delay certificates were invalid. At the High Court, Fairmount argued that the arbitrator's decision to set time at large rather than determine the reasonable extension of time that SBT was entitled to ('the disputed issue') had not been submitted for arbitration and therefore the decision ran foul of s 48(1)(a)(iv) of the Singapore Act (the jurisdiction issue). Furthermore, Fairmount was deprived of putting forward a case against setting time at large, in breach of its right to be heard and contrary to s 48(1)(a)(vii) of the Singapore Act (the natural justice issue). On the jurisdiction issue, the Singapore High Court held that a finding that time was at large would not necessarily be unanticipated or extraordinary or completely outside the contemplation of the parties when questions of delay had to be considered. While the parties might not have conducted their respective cases on the basis that various acts by the architect and/or Fairmount had led to time being at large, the central issue was, in the end, about the period of time within which SBT had to complete its work. On the natural justice issue, the trial judge found that there had been a breach of Fairmount's right to be heard. The disputed issue was not a live issue before the arbitrator, and therefore Fairmount had been deprived of an opportunity to be heard on this issue, including the consequential question of what would constitute a reasonable time within which SBT would have to complete. Therefore, Fairmount had been deprived on an opportunity to present the requisite evidence to the tribunal. Fairmount was prejudiced because the consequence of the arbitrator's decision to set time at large was that SBT was held not to be in breach of its contractual and common law obligations, and that Fairmount in turn had wrongfully repudiated its contract with SBT. In any case, the trial judge observed that a breach of natural justice itself created prejudice that would be suffered by one of the parties. Having found that Fairmount had been deprived of its right to be heard on whether time should be set at large, the judge then decided to set aside the entire award. SBT's appeal to the Singapore Court of Appeal was allowed and the arbitral award was restored. The Singapore Court of Appeal held that:

(a) A party challenging an award for breach of natural justice had to show:

(i) which rule of natural justice was breached; (ii) how it was breached; (iii) in what way the breach was connected to the making of the award; and (iv) how the breach

prejudiced its rights. However, it did not agree with the unqualified proposition that a breach of the rules of natural justice itself created a prejudice that was suffered by the party who had been deprived of its rights because if it were accurate, every breach of the rules of natural justice could constitute some form of prejudice. This would invariably dilute, indeed negate, the force of the plain statutory requirement in s 48(1)(a)(vii) of the Singapore Act that 'a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced'. Had Parliament intended that a breach of the rules of natural justice was sufficient to set aside an arbitral award, it would not have included the italised words;

(b) In Singapore, an applicant would have to persuade the court that there had been some actual or real prejudice caused by the alleged breach. While this was a lower hurdle than substantial prejudice, it certainly did not embrace technical or procedural irregularities that had caused no harm in the final analysis. There had to be more than technical unfairness. It was neither desirable nor possible to predict the infinite range of factual permutations or imponderables that might confront the courts in the future. What could be said was that to attract curial intervention it had to be established that the breach of the rules of natural justice had to, at the very least, actually alter the final outcome of the arbitral proceedings in some meaningful way. If, on the other hand, the same result could or would ultimately have been attained, or if it could be shown that the complainant could not have presented any groundbreaking evidence and/or submissions regardless, the bare fact that the arbitrator might have inadvertently denied one or both parties some technical aspect of a fair hearing would almost invariably be insufficient to set aside the award; and

(c) there was no merit to the jurisdiction issue. The constantly reiterated refrain in SBT's pleadings that time had been set at large must have alerted and sensitised Fairmount to the fact that SBT was not only submitting that it was entitled to an extension of time because of Fairmount's acts of prevention, but that, in the alternative, time to complete was at large.

[52] In *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488, the liquidators and secured creditors applied to the High Court to set aside the arbitral award primarily on the grounds of: (a) a breach of natural justice pursuant to s 24(b) of the Singapore International Arbitration Act (Cap 143A, 2002 Rev Ed) read with s 34(2)(a)(ii) of the Model Law; and (b) excess of jurisdiction pursuant to s 34(2)(a)(iii) of the Model Law. The High Court judge set aside the award because he found, inter alia, that the tribunal failed to consider the liquidator's arguments, evidence and submissions on whether the obligation under an agreement to deliver clean title was qualified by the Tax Amnesty Agreement ('the TAA'). The Singapore Court of Appeal allowed the appeal in part holding, inter alia, that to fail to consider an important issue that had been pleaded in an arbitration was a breach of natural justice because in such a case, the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him. On the evidence, it was clear that the tribunal did attempt to engage the liquidator's arguments; the tribunal

subsequently chose to dismiss them. It was simply impossible, given the context of the arbitration, to draw the inference that the tribunal failed to apply its mind to the liquidator's arguments. Even if the tribunal had failed to consider the liquidator's secured creditor's arguments on the relevance of the TAA or had wrongly attributed the arguments of one party to the other party, and even if this had amounted to a breach of natural justice, it was unlikely to materially affect the conclusion which the tribunal reached on its analysis of the agreement, namely, that the liquidator and the secured creditors had breached the obligation to deliver clean title under the agreement. In short, even if there was a breach of natural justice, no prejudice resulted. For context, s 24(b) of the Singapore International Arbitration Act and s 48 of the Singapore Act on the setting aside of arbitral awards is as follows:

> *Singapore International Arbitration Act*
>
> *Section 24 — Court may set aside award*
>
> Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —
>
> (a) the making of the award was induced or affected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award *by which the rights of any party have been prejudiced*. (Emphasis added.)
>
> *Singapore Act*
>
> Section 48 — Court may set aside award
>
> (1) An award *may be set aside* by the Court —
>
> (a) If the party who applies to the Court to set aside the award proves to the satisfaction of the Court that —
>
> (i) a party to the arbitration agreement was under some incapacity;
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the laws of Singapore;
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
>
> (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, except that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;

(v) the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties, unless such agreement is contrary to any provisions of this Act from which the parties cannot derogate, or, in the absence of such agreement, is contrary to the provisions of this Act;

(vi) the making of the award was induced or affected by fraud or corruption;

(vii) *a breach of the rules of natural justice* occurred in connection with the making of the award *by which the rights of any party have been prejudiced*; or

(b) if the Court finds that —

(i) The subject-matter of the dispute is not capable of settlement by arbitration under this Act; or

(ii) The award is contrary to public policy.

(2) ...

(3) ... (Emphasis added.)

[53] In the light of the above, we think that the guiding principles on the exercise of residual discretion when an application for setting aside an award is grounded on breach of natural justice may be stated as follows:

(a) first, the court must consider: (a) which rule of natural justice was breached; (b) how it was breached; and (c) in what way the breach was connected to the making of the award;

(b) second, the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding;

(c) third, if the breach is relatively immaterial or was not likely to have affected the outcome, discretion will be refused;

(d) fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and that the arbitral tribunal would not have reached a different conclusion the court may refuse to set aside the award;

(e) fifth, where the breach is significant and might have affected the outcome, the award may be set aside;

(f) sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award;

(g) seventh, the discretion given the court was intended to confer a wide discretion dependent on the nature of the breach and its impact.

Therefore, the materiality of the breach and the possible effect on the outcome are relevant factors for consideration by the court; and

(h) eighth, whilst materiality and causative factors are necessary to be established, prejudice is not a pre-requisite or requirement to set aside an award for breach of the rules of natural justice.

[54] Underlying these guiding principles is the policies and objectives of the New York Convention and the Model Law. As a matter of principle and policy, the courts will seek to support rather than frustrate or subvert the arbitration process. The role of courts in the arbitral regime in general is one of assistance supportive of the arbitral process and not one of interference with it. Bearing in mind the two primary objectives of the Model Law (respect for and preservation of party autonomy and ensuring procedural fairness), the courts do not review the merits of the arbitral tribunal's decision.

[55] In the present appeal before us, the High Court had made a clear finding that there were the two breaches of the rules of natural justice. That finding stands unchallenged in the Court of Appeal. However, the High Court judge declined to set aside the award on the ground that the respondent was not prejudiced by the breaches. The Court of Appeal set aside the award on the ground that once a breach of natural justice has been established, the whole award must be set aside; reading sub-ss 37(1)(b)(ii) with (2) of the AA 2005. The Court of Appeal held that the terms of s 37 do not appear to allow for severance, especially in view of the terms of sub-s 37(3) read with sub-s 37(1)(a)(v).

[56] In our view, the High Court judge adopted the Singapore position as propounded in *Soh Beng Tee* and subsequently adopted in *AKN* which requires an applicant to show 'actual or real prejudice' in that 'it must be established that the breach of the rules of natural justice must, at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way'. Whilst we appreciate the appellant's arguments that s 37 should be interpreted in a manner consistent with the underlying policies and objectives of the New York Convention and the Model Law, the courts must be mindful against importing principles advocated by foreign jurisdictions without careful consideration of the foreign law in question and our AA 2005. In this respect, we are bound to agree with the submission of the respondent that the Singapore position is not applicable in Malaysia. We say this because sub-ss 37(1)(b)(ii) and (2)(b)(ii) do not require prejudice to be established; unlike s 48(1)(a)(vi) of the Singapore Act which requires the applicant to show that the rights of any party have been prejudiced.

[57] The imposition of a requirement of prejudice narrows down what is intended to be a wide discretion. The report of UNCITRAL on the work of its

18th session (3–21 June 1985), UN A/40/17, states at para 303:

> It was understood that an award might be set aside on any of the grounds listed in paragraph (2) irrespective of whether such ground had materially affected the award.

The learned authors of '*A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*' (Kluwer Law and Business, 1989), after examining the legislative history of article 34 of the Model Law on the setting aside of awards, observed at p 922:

> Prior to the Commission's deliberations, two delegations submitted written comments suggesting that even with this understanding as to Article 4, at least some procedural errors should be material to the result or serious in order for the award to be set aside. The Commission discussed this proposal at some length, during which it was suggested by the delegate who had been the chairman of the Working Group that the word 'may' in the opening sentence of Article 34(2) provided the court with discretion not to set aside the award even if grounds for doing so were present. The Commission Report eventually concluded merely that '[i]t was understood that an award might be set aside on any of the grounds listed in paragraph (2) irrespective of whether such ground had materially affected the award. It is submitted that both of these statements are consistent with each other and with the text of the Model Law: as noted by the Commission Report, a non-material error can give rise to grounds for setting aside the award, but, as noted during the debates, a setting-aside court has discretion not to set aside the award when such grounds are present.

[58] This reading is supported by the case law in New Zealand where the setting aside provision on the NZ Act mirrors s 37 of the AA 2005. Like s 37(2)(b) of the AA 2005, article 34(6)(b), Schedule 1 of the NZ Act does not stipulate the requirement of prejudice (*Kyburn*; *Trustees of Rotoaira Forest Trust v Attorney General* [1999] 2 NZLR 452). To reiterate, these decisions make the following points. First, the imposition of a requirement of prejudice narrows down what is intended to be a wide discretion (*Kyburn* at p 564); Second, provisions allowing for the setting aside of arbiral awards can be said to vest in the court a wide discretion to set aside awards. The question of whether an award ought to be set aside for breach of natural justice therefore does not turn on prejudice. It turns, instead, on amongst other things, the significance of the breach and the extent to which it might or may have affected the outcome of the arbitration. It is not necessary to show that the breach did in fact affect the outcome (*Kyburn* at p 653). Procedural prejudice would be sufficient to ground an application to set aside (*Rotaoira* at p 462). Fourth, there is no basis on which it can be said that the onus is on the applicant to show that the consequences of the breach are sufficiently material to warrant setting aside an award. The ordinary burden on an applicant cannot be elevated to a legal requirement to show that the outcome would be different had the breach not occurred (*Kyburn* at p 654). Fifthly, materiality of the breach and the possible

effect on the outcome are treated as relevant factors going to the exercise of the discretion, such as the likely costs of holding a re-hearing (*Kyburn* at p 654). Lastly, prejudice, if it can be shown, would be material. However, no single factor is decisive or necessary for an award to be set aside (*Kyburn* at p 654). *Kyburn* was cited with approval by this court in *Jan De Nul (M) Sdn Bhd*). We are in agreement with the view expressed by the Court of Appeal that the threshold under s 37 is very low as compared to that under s 42 of the AA 2005 (see para [38] of the Court of Appeal's written judgment).

[59] Although the court's discretion to set aside an award under s 37(1) is unfettered, it must nevertheless be exercised with regard to the policies and objectives underpinning the AA 2005. In particular, due cognisance must be taken of the purposes of encouraging arbitration as a method of dispute resolution and facilitating the recognition and enforcement of arbitral awards. For the foregoing reasons, questions 1 and 2 are answered in the negative.

[60] Whilst the appellant's argument focused on paras [34]–[35] of the Court of Appeal's written judgment, we think it is also necessary to advert to paras [87] and [90]–[92] of the written judgment which dealt with the two pieces of extraneous evidence. The Court of Appeal found that the two pieces of extraneous evidence were relevant and material to the issue of causation of the damage to the stinger hitch, and the evidence in question were considered by the arbitrator without informing the parties until the award was rendered, by which time it was too late. As such, the case which had been submitted for arbitration had been redefined by the arbitrator without giving the parties the opportunity to present their responses. We are therefore in agreement with the views expressed by the Court of Appeal in paras [90]–[92] of the written judgment: that without these two pieces of extraneous evidence which were never put to the parties, the arbitration would also have reached a different outcome. As such, the Court of Appeal was correct in setting aside the entire award on the basis that the breach had materiality and causative effect on the outcome of the arbitration. On the established facts and on a perusal of the evidence on the appeal record, we are satisfied that the High Court judge erred and that appellate intervention was warranted.

[61] In the light of the foregoing, we are also in agreement with counsel for the respondent that question 3 is wrongly premised on the assumption that only one part of the award is bad in law. As such, we decline to answer question 3.

[62] As for question 4, the issues have already been addressed in the foregoing paragraphs on the guiding principles on the exercise of discretion. As stated, a mere finding of a breach of the rules of natural justice is in itself insufficient. It must be shown that the breach was significant or serious such as

to have an impact on the outcome of the arbitration. Prejudice, though, a relevant consideration, is not a requirement.

[63] For the foregoing reasons, the appeal is dismissed with costs. The order of the Court of Appeal is affirmed.

Appeal dismissed and COA's decision affirmed.

Reported by Ashok Kumar